Supreme Court, U.S.
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No. 87-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANNETTE L. GERHARDT, AS GUARDIAN AD LITEM FOR HEATHER J. KRUEGER,

Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a court-approved settlement reached in 1970 in a paternity proceeding, which was entered into pursuant to statutory direction by an illegitimate child's mother, father and the district attorney—whereby the father admitted paternity and made a lump-sum payment for child support and birthing expenses—is *res judicata* as to an action commenced by the child fourteen years later to modify the support which had been agreed-upon and paid pursuant to the settlement?

2. Whether Wisconsin's former statutory scheme for paternity proceedings (repealed effective 1981) denied illegitimate children equal protection because it allowed the parties to a paternity action to reach settlements pursuant to which the illegitimate child's support needs to the age of eighteen could be satisfied either by lump-sum payment or by periodic payments in that election of the lump-sum payment alternative shortened the period during which modification of the agreement could later be sought?

LIST OF PARTIES

The caption contains the correct names of all the parties in the proceedings below.

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OPINION BELOW

The Wisconsin Supreme Court's decision is reported as *Gerhardt v. Estate of Moore*, 139 Wis. 2d 833, 407 N.W.2d 895 (1987), and is printed in petitioner's Appendix.

JURISDICTION

Jurisdiction appears to be appropriate under 28 U.S.C. § 1257(3) (1982). However, a substantial federal question would not be present if the Court concludes that the equal protection issue posited by petitioner need not be reached because dismissal of the action below was correctly affirmed by the Wisconsin Supreme Court on the basis of *res judicata*.

RELEVANT STATUTES

Wis. Stat. § 52.28

52.28 **Settlement agreements.** A woman who has borne a child out of wedlock or who is pregnant with a child which is likely to be born, out of wedlock, may enter into an agreement with the person claimed by her to be the father of the child. Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process, or at any time while said judgment is still in effect. No agreement shall be entered into before the birth of the child unless the court finds that there are special circumstances making it advisable to do so. The agreement shall include a determination of all facts and orders which s. 52.37 requires the court to determine in its order for judgment, except that where the parties are unable to agree as to the paternity of the child, the alleged father may deny paternity in the agreement. By the terms of the agreement the defendant must submit personally to the jurisdiction of the court, and consent to entry of judgment in accordance with the terms of the agreement. Upon motion of the district attorney, the judge of a court of record having power to enter final

judgment in paternity proceedings, being satisfied with the terms of the agreement, shall order judgment in accordance therewith if paternity of the child is admitted. Where the paternity of the child is not admitted, after said agreement is approved by the court, it shall be filed but judgment shall not be rendered until there is a default of the payments agreed upon, when, upon motion of the district attorney, judgment shall be rendered and entered forthwith. All agreements referred to in ss. 52.21 to 52.45 shall be drawn by the district attorney. No other agreement or settlement of any paternity proceeding shall be valid.

Wis. Stat. § 52.29

52.29 **Agreement by district attorney.** In all cases where the mother commences any proceedings under this chapter and fails to prosecute the same, or where she has been delivered of a child born out of wedlock which is likely to become a public charge or shall be pregnant with a child likely to be born out of wedlock and to become a public charge, the district attorney of the county in which she resides shall have power to make an agreement with the putative father in the same manner and with the same force and effect as might be made by the mother.

Wis. Stat. § 52.37

52.37 **Judgment.** (1) If the defendant is found the father of the child, or admits the truth of the allegation, or enters into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement, and shall be ordered to pay all expenses incurred for lying-in and attendance of the mother during pregnancy, and also for the past care and support of the child, from the time of its birth until the date of the approval of the agreement or the entry of judgment. If the child is dead at the time of trial he shall pay the expenses of the funeral and the expenses of the last illness. All payments and expenses stated herein shall be paid by the accused to a trustee, and the settlement

agreement or judgment shall specifically provide for the amount of disbursement and indicate the person to whom the trustee shall make such disbursement.

(2) The defendant shall also pay to the county the costs of the action and is chargeable for the future support of the child until it attains the age of 18 years. Payments for such future support shall be directed to be made in either of the 2 following methods:

(a) Payment of a specified monthly sum until the child is 18 years of age;

(b) Payment of a specified lump sum to be paid upon the approval of an agreement or entry of judgment, or in specified minimum monthly instalments and other necessary instalments within 4 years following a period of 30 days after the date of such approval or entry of judgment, subject to the condition that upon default in any monthly instalment, the court reserves the right to require the defendant to pay monthly support money for the child until it attains the age of 18 years. All payments for the future support of the child shall be paid to a trustee and shall be held by him for the benefit of the child, subject to the order of the court, and shall be paid by him to the person, agency or institution having legal custody of the child in such manner and amounts as the court directs.

(3) All of the foregoing matters shall be ascertained and fixed by the court and, together with such attorneys' fees as have been allowed, shall be inserted in the judgment, with an order directed to the clerk of the court to file with the state registrar of vital statistics a certified copy of all judgments determining the paternity of the child, and a report showing the name, date and place of birth of the child and the name, color, residence, age, birthplace and occupation of the father of the child. The registrar shall thereupon issue a new certificate, pursuant to and in accordance with the judgment of the court. Such new certificate shall be issued substantially in accordance with the provisions of ss. 69.33 and 69.24 (1) (e) and the clerk of the court shall collect a fee of $1 which shall be

transmitted to the bureau of vital statistics. Judgments entered upon agreement of the parties shall conform to the above unless the parties are unable to agree as to the paternity of the child, when such adjudication may be omitted.

(4) All such judgments shall be satisfied of record by the clerk on payment to him of the costs and the filing of satisfaction of judgment executed and acknowledged by the complainant and trustee, if a trustee be appointed, and whenever ordered so to do by a written order of the court.

Wis. Stat. § 52.38

52.38 Continuing jurisdiction; revision of judgment or agreement. (1) Whenever settlement has been made pursuant to s. 52.37 and the defendant fails to comply with the terms of such settlement, or whenever the judgment or agreement providing for the monthly support of a child born out of wedlock has been docketed or filed, the court shall have continuing jurisdiction and may, on the petition of the district attorney, the trustee, the mother, the named or adjudicated father, or any other person, agency or institution having legal custody of the child or upon stipulation signed by the defendant and the person, agency or institution having legal custody of the child and approved by the district attorney, revise and alter such judgment or agreement respecting the amount of support and the payment thereof and in its discretion may provide for or increase or decrease the amount of future support, and may make such further judgment or order as the circumstances of the parties require.

(2) Whenever a petition is brought to the court as hereinabove set forth, the district attorney, the defendant, and the person, agency or institution having legal custody of the child, must be served with a copy of the petition at least 10 days before the date set for the hearing.

(3) Nothing in this section shall in any way be considered a derogation of s. 52.05.

STATEMENT OF THE CASE

The decision of the Wisconsin Supreme Court contains an accurate and complete statement of the case which, for purposes of this brief, Respondent adopts and incorporates by reference.

SUMMARY OF THE STATUTORY SCHEME AT ISSUE

Wisconsin's former statutory scheme for paternity proceedings (Chapter 52, Wis. Stats. [1967], replaced and superseded by Chapter 767, Wis. Stats. [1981]) permitted parties to reach a court-approved settlement short of trial pursuant to which the illegitimate child's support needs could be met either by lump-sum payment or by periodic payments. The criteria for determining the appropriate amount of total support was identical for both payment options, focusing on the illegitimate child's need for support until the age of eighteen. Wis. Stat. § 52.37(2).

The so-called "lump-sum payment" alternative could be made in a single payment or, as occurred in this case, through monthly installments spread over a period of up to four years. Wis. Stat. § 52.37(2). The lump-sum option was subject to the condition that, upon default in any monthly installment, the court could order the father to convert to the periodic payment alternative. Wis. Stat. § 52.37(2)(b).

Significantly, regardless of which payment option was employed, the judgment remained unsatisfied of record

and was subject to modification until such time as the father made all required payments. Wis. Stat. §§ 52.37(4) and 52.38(1). The father was entitled to entry of a satisfaction of judgment only upon making all payments called for pursuant to the particular payment option selected by the parties. Wis. Stat. § 52.37(4). In the present case, the father satisfied his obligations under the stipulated judgment by making timely payment of his monthly installments over four years.

REASONS FOR DENYING CERTIORARI

I.

EQUAL PROTECTION IS NOT VIOLATED BY AFFORDING AN ADDITIONAL, OPTIONAL PAYMENT METHOD FOR SATISFYING SUPPORT OBLIGATIONS TO ILLEGITIMATE CHILDREN.

Petitioner urges the Court to expand equal protection analysis far beyond any of the Court's prior holdings. Petitioner contends that Wisconsin's former statutory scheme for paternity proceedings denied illegitimate children equal protection because it gave them *too much*, not too little!

Wisconsin's former paternity statutes undeniably provided illegitimate children with the same procedural rights and substantive entitlements to support afforded legitimate children in non-paternity proceedings. The problem, according to petitioner, is that the statutes permitted an *additional, alternative* method by which fathers could satisfy their support obligations to illegitimate children in the context of a paternity proceeding—namely, through lump-sum payments—which was unavailable for support

of legitimate children in non-paternity proceedings. Petitioner reasons that affording the lump-sum payment *alternative* discriminated against illegitimate children because, as to those illegitimate children for whom the option was accepted, it resulted in a shorter period for seeking future modification than that enjoyed by those illegitimate children and legitimate children whose support needs were provided for through periodic payments.[1]

The Wisconsin Supreme Court was correct in its conclusion that "[a] child born out of wedlock is not denied equal protection simply because the statutes provide an additional, optional method for satisfying a support obligation" (Decision, petitioner's App. at 11a). Research fails to disclose any authority for petitioner's novel theory that a protected class is denied equal protection by a statutory scheme which grants the protected class a purely optional procedure *in addition to* the procedures available to the non-protected class. Moreover, even if, *arguendo*, the challenged statutory scheme were deemed to create a classification warranting constitutional scrutiny, it would pass muster under this Court's holdings as explained below because the distinction is reasonably related to Wisconsin's legitimate state interest in promoting settlements and according finality to paternity judgments.

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[1] Petitioner also makes much of the fact that the illegitimate child in this case was not represented by a *guardian ad litem* at the time the settlement agreement was entered into in 1970. Petitioner's argument is without constitutional significance. As noted below by the Wisconsin Supreme Court, *guardians* are seldom appointed in connection with settlements involving support for legitimate or illegitimate children (Decision, petitioner's App. at 7a). In such proceedings, it has always been the practice for the custodial parent to speak for the child. *Id.*

II.

THE WISCONSIN SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS REGARDING EQUAL PROTECTION AND THE RIGHTS OF ILLEGITIMATE CHILDREN.

This Court has issued a substantial body of decisions applying equal protection analysis to state statutory schemes affecting the rights of illegitimate children.[2] The Court's decisions have focused on two areas—statutes limiting inheritance by illegitimate children and statutes prescribing short limitations periods on commencement of paternity proceedings. *Compare Mills, supra* (striking Texas' one-year limitation period on commencing paternity actions) *with Trimble, supra* (striking Illinois statute barring illegitimate children from inheriting from father's estate). The starting point in the Court's equal protection analysis in these cases is clear:

> [A] state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.

Gomez v. Perez, 409 U.S. 535, 538 (1973).

As reflected in this Court's prior decisions on the subject, articulation of the general rule (quoted above from *Gomez*) does little to advance the analysis as to whether a particular statutory scheme accords equal protection to

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[2] In *Trimble v. Gordon*, 430 U.S. 763, 767 n. 11 (1977), the Court noted that it had addressed twelve such cases since 1968 alone. A number of significant additional decisions have followed. *See Reed v. Campbell*, ____ U.S. ____, 106 S. Ct. 2234 (1986); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982). Indeed, the Court just accepted certiorari of a case involving the constitutionality of a Pennsylvania statute which imposes a six-year limitation period on commencement of paternity proceedings. *Clark v. Jeter*, No. 87-5565 (cert. granted, January 12, 1988).

illegitimate children. This is particularly true in the present case because the Wisconsin paternity statutes at issue here do not fall squarely into either of the two areas covered by the Court's prior rulings.

The constitutional inquiry starts with the applicable level of scrutiny. A classification based on illegitimacy is not "suspect" so as to require that it survive "strict scrutiny." *Mathews v. Lucas*, 427 U.S. 495, 506 (1976). A classification based on illegitimacy is permissible provided that it bears "some rational relationship to a legitimate state purpose." *Trimble*, 430 U.S. at 763, *quoting Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). Stated another way, equal protection is satisfied unless the state's distinction is "mindless and patently irrational." *Trimble*, 430 U.S. at 787 (Rehnquist, J., dissenting).

In determining whether the Wisconsin paternity statutes at issue here bear some rational relationship to a legitimate state purpose, it is important to bear in mind this Court's repeated observation that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside. . . ." *Gomez*, 409 U.S. at 538, *quoted with approval, e.g., Mills v. Habluetzel*, 456 U.S. at 94. The Court has also recognized the need for states to draw "arbitrary lines . . . to facilitate potentially difficult problems of proof." *Weber*, 406 U.S. at 174.

Because of the problems associated with proof of paternity, the Court has held that equal protection does not mandate that states adopt support procedures for illegitimate children which are identical to those afforded legitimate children:

> The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt pro-

> cedures for illegitimate children that are coterminous with those accorded legitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this court. [Citations omitted]
>
> . . .
>
> Therefore, in support suits by illegitimate children more than in support suits by legitimate children, the State has an interest in preventing the prosecution of stale or fraudulent claims and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. [Citations omitted]

Mills, 456 U.S. at 97-100.[3]

The Court's above-quoted comments from *Mills* are particularly pertinent here. The payment procedures used to provide support to illegitimate children pursuant to paternity proceedings and those used for legitimate children pursuant to other actions affecting the family are not, and, according to *Mills*, need not be, coterminous because the two situations are no more comparable for purposes of equal protection analysis than "apples and oranges".

In the typical divorce or separation action involving support for a legitimate child, the issues are limited to the parents' ability to pay and the needs of the child. In a paternity proceeding, by contrast, the foundation issue is

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[3] Interestingly, the Texas paternity statute at issue in *Mills* also permitted lump-sum support payments to be made in lieu of periodic payments, a fact the Court noted without criticism. 456 U.S. at 95.

proof of paternity—a failure on that issue bars the child from any support whatsoever. The risk of losing at trial on the paternity issue is significant and cannot, as this Court has repeatedly noted, "be lightly brushed aside." *Gomez*, 409 U.S. at 538. *Accord, Mills*, 456 at 94.

III.

THE STATUTORY SCHEME AT ISSUE IS REASONABLY RELATED TO WISCONSIN'S LEGITIMATE STATE INTEREST IN PROMOTING SETTLEMENTS AND ACCORDING FINALITY TO PATERNITY JUDGMENTS.

The statutory scheme at issue here advances several legitimate state interests. First, to the extent that the availability of the lump-sum payment alternative promotes settlement by offering the parties a better alternative than may result to one side or the other should the matter go to trial, it reduces litigation and the resultant burden on the state court system. It also reduces the number of illegitimate children who obtain no support whatsoever because of failure of proof on the paternity issue at trial which, in turn, adds to the burden on the state's welfare system. Moreover, it should not be overlooked that Wisconsin designed the statutory procedure for paternity settlements to promote not only the public interest but also the interest of the illegitimate child. *See Decision*, petitioner's App. at 8a, *citing Smazal v. Estate of Dassow*, 23 Wis. 2d 336, 340, 127 N.W.2d 234 (1964).

Petitioner's position also ignores the nature of compromise and the strong public policy supporting it. As the Wisconsin Supreme Court reasoned in this case:

> Implicit in the provision of a mechanism for paternity settlement is the recognition that parties will accept a settlement which does not provide for the full support of the child until the age of 18. A settlement,

> by its very nature, involves concessions by each party in an attempt to resolve the dispute without additional litigation. In reaching settlements, the parties balance a number of competing interests, including the issue of paternity itself, the possibility of the father's absence by death or departure, the present financial position and the future income potential of the father, and present and future living expenses. Because many of these considerations are not predictable with any particularity, a lump-sum settlement tends to be only an estimate which may, in hindsight, appear to be inadequate. However, where paternity is denied and the issue must go to trial, a settlement agreement may be a reasonable compromise.

In the present case, it is impossible to theorize what may or may not have happened but for the settlement. It is not unreasonable to assume that, if the lump-sum payment had not been a condition to the admission of paternity, the respondent may have chosen to contest the paternity issue. Had the respondent prevailed, the illegitimate child would have been foreclosed without any support whatsoever.

The settlement agreement in this case expressly provided that "this agreement and full and complete performance thereof, shall constitute full and final settlement" (Petitioner's App. at 27a). The lump-sum payment was the inducement for the respondent to admit paternity. It would be grossly unfair to permit the petitioner to proceed now for additional support based upon the father's admission of paternity when the lump-sum payment was the inducement for the admission of paternity fifteen years earlier.

Petitioner seeks to retain all the benefits of the compromise without any of its burdens or limitations. The

trial court noted the problems with the result advocated by petitioner:

> In closing, the court would point out that the petitioner in this case is happy to accept respondent's admission of paternity and the money that he has paid as a result of that admission. If the statute is unconstitutional for all purposes, as the petitioner contends, it would seem to the court that the admission of paternity, having been made presumably to obtain the advantage of a lump-sum settlement, would have to be vacated. It would likewise seem that any and all monies paid by the respondent to Heather's mother would have to be returned to the respondent, with interest, and then this proceeding could commence. The court cannot conceive that the Supreme Court contemplated that such a situation should develop.

Petitioner's App. at 20a-21a.

Moreover, it should be noted that the passage of time has, for practical reasons, made it impossible to vacate the judgment and return the parties to their original position prior to the settlement. Respondent is now deceased (*see* Petition at 7 n. 4), so it would be impossible to now litigate the question of paternity which had been avoided in 1970 by virtue of the settlement agreement.

Wisconsin's former paternity statutes pass constitutional muster under this Court's precedents because the statutes were reasonably related to Wisconsin's legitimate state interest in promoting settlement and according finality to paternity judgments. Wisconsin's distinction is "not mindless and patently irrational". *Trimble*, 430 U.S. at 787. Nor, are the justifications underlying Wisconsin's classification any less reasonable than those advanced for the statutes upheld by the Court in other cases. *See, e.g., Matthews v. Lucas*, 427 U.S. at 496.

IV.

THIS CASE IS NOT A GOOD VEHICLE FOR ADVANCING THE COURT'S LAW-DEVELOPMENT FUNCTION.

For a variety of reasons, this case is not a good vehicle for advancing the Court's law-development function. First and foremost, the Wisconsin statutory scheme in question was repealed and replaced effective 1981. Research fails to disclose the existence of any similar statutory schemes now in effect in other states.

Second, the statutes involved in the state court decisions cited in the petition are readily distinguishable from Wisconsin's former paternity statutes. Each of the cases cited by petitioner rises and falls on its own unique statutory scheme and the public policies relied upon by each state to support the particular classifications. The other decisions do not involve analogous lump-sum payment provisions. Review of the present case would result in a decision having little precedential value in Wisconsin (to anyone other than petitioner) and would not be a suitable vehicle for offering more general guidance to other states.

Finally, death of the respondent father also clouds the utility of any further decision in this case. For example, were the Court to accept review and hold that the statutory scheme was unconstitutional, the Court would be left to wrestle with the awkward question of whether and how the resurrected issue of paternity should be litigated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATE OF WISCONSIN | COUNTY COURT BRANCH III | DANE COUNTY

STATE OF WISCONSIN,	)	
	)	
Plaintiff,	)	
	)	
by BETTY LOU KRUEGER,	)	
	)	
Complainant,	)	FINDINGS AND
	)	
vs.	)	JUDGMENT
	)	
ARLEN LEE MOORE,	)	
	)	
Defendant.	)	

The parties to this action on the [illegible] day of February, 1970, entered into a written agreement of settlement wherein the defendant consented to entry of judgment pursuant to the terms of the said agreement and the law applicable thereto. The said agreement having been duly approved and ordered filed;

NOW, on motion of ANDREW [illegible], Assistant District Attorney for Dane County, it is

FOUND AND ADJUDGED

1. That on the 7th day of September, 1969, the complainant gave birth to a female child, since named Heather Jo Krueger; that said child was born out of wedlock in Madison, Wisconsin; that the defendant is the father of said child; that the defendant is a resident of Dane County, Wisconsin.

2. That the defendant is ordered to contribute to the future support and maintenance of said child in the following manner: The defendant shall pay to the Clerk of County Court, Branch III, for Dane County, as Trustee, the sum of $75.00 per month on or before the 1st day of each month, beginning on the 1st day of [illegible], 1970, and a like amount of $75.00 on the 1st day of each month thereafter for a period of 17 months making a total payment of $3,600.00. Defendant shall further pay to Sauk County, Wisconsin, the sum of $1,000.00 for medical reimbursement paid on behalf of the complainant at the rate of $20.00 per month for 50 months, beginning [illegible] 1970.

11/4/70 — Certified copy sent to S.B.V.S. Check #44233.

3. That the Clerk of County Court, Branch III, for Dane County, will act as Trustee, for the collection of funds paid under the terms of this agreement; and that all such funds so collected by said Clerk as Trustee, as support funds will be paid over to the complainant, Betty Lou Krueger. And also that the $20.00 per month for medical reimbursement be paid to the County Treasurer's Office of Sauk County, at Baraboo, Wisconsin.

4. That the Clerk of County Court, Branch III, is hereby ordered and directed to file with the State Registrar of Vital Statistics, a certified copy of this Judgment with the following information concerning the defendant:

Name: Arlen Lee Moore

Race: White

Age: 21 now, 20 on Sept. 7, 1969

Residence: 1010 Gilson St., Madison

Occupation: Chemical Technician

5. That the defendant shall pay to the Clerk of County Court, Branch III, the cost and disbursements of this action; and shall also pay to the Clerk of said Court the sum of Two ($2.00) dollars as a fee for the transmission of a certified copy of this judgment to the State Registrar of Vital Statistics.

6. That the defendant, not having given bond to Dane County in accordance with Section 52.39, Wisconsin Statutes, 1967, hereby is committed to the County Jail until he shall comply with this Judgment or shall otherwise be discharged according to law; the Court, however, stays execution of the aforesaid committment, and said execution of committment so stayed shall issue at any time when it shall appear to the Court that the defendant has defaulted on any of the provisions of this judgment.

Dated this 27th day of October, 1970.

/s/ RUSSELL J. MITTELSTADT

Judge

County Court, Branch
Dane County, Wisconsin